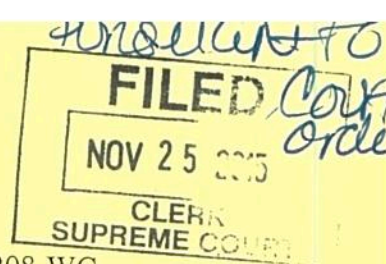


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NOS.: 2015-SC-000194-WC and 2015-SC-000208-WC



FAMILY DOLLAR

APPELLANT/CROSS-APPELLEE

vs.

MAMIE BAYTOS, WIDOW OF STEPHEN BAYTOS
HON. RICHARD M. JOINER, ALJ;
HON. THOMAS G. POLITES, ALJ
and WORKERS COMPENSATION BOARD

APPELLEES/CROSS-APPELLANTS

Appeal from Kentucky Court of Appeals 2014-CA-001053-WC

BRIEF ON BEHALF OF THE CROSS-APPELLEE, FAMILY DOLLAR

Respectfully Submitted,

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CERTIFICATE

In accordance with C.R. 5.02 and C.R. 5.03, I hereby certify that the original and ten (10) copies of the Appellant/Cross-Appellee Brief were served via US Mail, on the 13th day of November, 2015, to Susan Clary, Clerk of the Supreme Court of Kentucky, Capitol Building, Frankfort, KY 40601; and copies to: Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Workers' Compensation Board, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky 40601; Hon. Carl Grayson, Blankenship Massey & Associates, PLLC, 504 Erlanger Road, Erlanger, KY 41018, Attorney for Mamie Baytos; Hon. Tom Polites, ALJ, 2780 Research Park Drive, Lexington, KY 40511, reassigned ALJ; Hon. Richard Joiner, 145 East Center Street, Madisonville, KY 42431; Hon. Lewis Paisley, Stoll, Keenon, Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507. A courtesy copy has also been sent to Hon. Jeff Roberts, 509 Main Street, Murray, KY 42071, attorney for KIWA.

Melanie B. Gabbard
HON. MELANIE B. GABBARD

INTRODUCTION

This is a case in which the Court of Appeals vacated and remanded the decision of the Workers' Compensation Board and awarded benefits under KRS 342.750 to Mamie Baytos, widow of Stephen Baytos, following a full and final resolution of his claim via settlement effectuated prior to his death in December 2009. The Appellant, Family Dollar, challenges the decision of the Court of Appeals and asserts that the Court of Appeals erred as a matter of law.

Maymie Baytos, widow of Stephen Baytos, also filed a cross-appeal challenging the decision of the Workers' Compensation Board which denied her Motion to Dismiss Family Dollar's appeal on the issue of defective notice of appeal. The Appellant/Cross-Appellee submits this responsive brief on that singular issue.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant/Cross-Appellee, Family Dollar, avers that as to the substantive arguments contained in this appeal, this claim raises an issue of first impression in Kentucky, with far-reaching implications for the payment and settlement of future benefits under the Workers' Compensation Act. For this reason, the Appellant would respectfully submit that Oral Arguments are necessary in order for the Court to fully evaluate and decide the issue presented.

As to the procedural argument contained within the cross-appeal by Mamie Baytos, no oral argument is necessary.

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COUNTERSTATEMENT OF THE CASE

Family Dollar relies on the substantive facts as outlined in their Statement of the Case submitted as part of their Appellant Brief filed as part of this appeal. For this cross-appeal from the March 20, 2015, Opinion of the Court of Appeals and the June 2, 2014 Order of the Workers' Compensation Board denying Mamie Baytos' Motion to Dismiss Family Dollar's appeal due to a defective Notice of Appeal, the Appellant/Cross-Appellee, Family Dollar, submits these procedural facts.

On August 31, 2011, Mamie Baytos, widow of Stephen Baytos, filed a Motion to Reopen the claim to request payment of death benefits to her under KRS 342.750. Administrative Law Judge Richard Joiner bifurcated the claim to first determine whether or not Mamie Baytos, as a widow, had the right to assert entitlement to benefits under KRS 342.750 following a full and final settlement of benefits by her husband prior to his death.

ALJ Joiner rendered his decision on the legal issue of entitlement to benefits on June 19, 2012, ruling that the widow's claim for benefits was entirely her own and not barred by settlement achieved by the Plaintiff. Judge Joiner's opinion was interlocutory given the bifurcation of the claim.

The second issue to be decided was the factual issue of whether or not Stephen Baytos' death was the direct result of his work-related injury. The secondary portion of litigation was assigned to ALJ Tom Polites upon the retirement of ALJ Joiner. Following litigation, Judge Polites rendered a decision on February 3, 2014, finding

that Stephen Baytos' death was work-related and awarded benefits to the widow under KRS 342.750.

Family Dollar appealed the substantive decision of ALJ Joiner to the Workers' Compensation Board on the sole issue of whether or not the widow was legally entitled to benefits under the Act. Procedurally, the February 3, 2014 decision of Judge Polites made the entirety of the claim final and appealable. Family Dollar noted in their Notice of Appeal that they requested a review of the Opinion and Award of Judge Richard Joiner, whose decision was made final and appealable following the adjudication of the claim by Judge Tom Polites. Family Dollar distinguished the appeal to place the parties on notice that appeal was being taken on the legal issue adjudicated by Judge Joiner, not the factual issue adjudicated by Judge Polites.

The Workers' Compensation Board denied Appellee/Cross-Appellant's Motion to Dismiss the Appeal via an Order dated March 26, 2014, noting that the appeal was proper and timely filed.

On March 20, 2015, the Court of Appeals rendered a decision affirming the Workers' Compensation Board's denial of Mamie Baytos' Motion to Dismiss the Appeal.

This cross-appeal by Mamie Baytos followed.

ARGUMENT

THE APPEAL TO THE WORKERS' COMPENSATION BOARD WAS TIMELY AND APPROPRIATE AND SHOULD NOT BE DISMISSED.

The Appellee/Cross-Appellant requests dismissal of an appeal which was not only timely submitted to the Workers' Compensation Board, but properly, and in accordance with the Civil Rules, appealed to the Board. The Appellee/Cross-Appellant

has noted correctly that within 30 days of a final award, order or decision rendered by an Administrative Law Judge any party aggrieved by that award, order or decision may file a notice of appeal to the Workers' Compensation Board. Undersigned counsel did precisely that. Notice was given that review was requested, with specific denotation that the subject matter of the appeal was the decision rendered by Judge Joiner, which was made final by Judge Tom Polites on February 4, 2014. The Respondent then seems to suggest that Judge Joiner's decision is not final because his decision was re-adjudicated and superseded by the Opinion of Judge Polites. The argument of the Appellee/Cross-Appellant confounds logic, reason and most of all, practicality.

The only manner in which this Appellant/Cross-Appellee has to appeal the decision of Judge Joiner was to await the decision of Judge Polites before requesting review by the Workers' Compensation Board. Judge Joiner's 2012 Opinion was a decision on a threshold issue of entitlement to benefits. Right to appeal that decision was abeyed until the completion of the secondary portion of the bifurcated claim, which was adjudicated by Judge Tom Polites upon reassignment due to Judge Joiner's retirement. The Respondent would seem to be asking this Board to believe the notion that there was no ability to appeal the decision of Judge Joiner due to the Opinion of Judge Polites. It is abundantly clear that Judge Polites' decision was singular in nature and addressed only the issue of causation and not the threshold issue of entitlement to benefits. Undersigned counsel specified the substantive nature of the appeal to note that the subject matter was that of Judge Joiner and not that of Judge Polites. The appeal itself, however, was taken from the decision of Judge Polites as his Opinion is what rendered the claim final.

In the Appellant/Cross-Appellee's Notice of Appeal to the Workers' Compensation Board, it was specifically noted that on February 4, 2014, Judge Polites rendered a decision in this claim which now made the decision of Judge Joiner final and appealable. Further, in the Appellant/Cross-Appellee's Brief, specific documentation is made that the appeal was requested following the final Order and decision of Judge Polites.

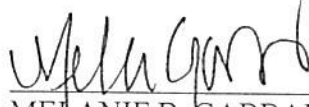
The argument by the Appellee/Cross-Appellant that the Notice of Appeal was defective is without merit and frustrates the role of this court in reviewing the substantive merits of this claim. Notice was given, pursuant to KRS 342.285, and 803 KAR 25:010 (§ 21) that Appellant/Cross-Appellee requested a review by the Workers' Compensation Board of the opinion and award rendered herein by Honorable Richard Joiner, Administrative Law Judge, on June 19, 2012. The final Order, by which Appeal was taken and allowed was on the Opinion rendered by Judge Tom Polites on February 4, 2014. Further, it is notable that had there been no change in ALJ during the course of the underlying litigation, the argument by the Appellee/Cross-Appellant would cease to exist. Appeal by the Appellant/Cross-Appellee was proper both procedurally and substantively.

Further, the Workers' Compensation Board summarily overruled the Appellee/Cross-Appellant's initial motion by noting the timely and appropriate appeal by the Appellant/Cross-Appellee.

CONCLUSION

WHEREFORE, the Appellant/Cross-Appellee prays that the Supreme Court AFFIRM the Court of Appeal's decision to deny the Appellee/Cross-Appellant's Motion to Dismiss the Appeal of Family Dollar.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Melanie Gabbard', written over a horizontal line.

MELANIE B. GABBARD

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